

# **ADMINISTRATIVE APPEAL DECISION**

**DAN KLAUS; FILE NO. 200400294**

**CHICAGO DISTRICT**

**AUGUST 1, 2005**

**Review Officer:** Michael G. Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

**Appellant:** Mr. Dan Klaus, KC Construction

**Jurisdiction:** Section 404 of the Clean Water Act (33 U.S.C. 1344)

**Appeal Meeting and Site Visit Date:** 29 June 2004

## **Background Information:**

On January 8, 2004, Mr. Kevin Jury (agent for the appellant) requested an approved jurisdictional determination (JD) from the Chicago District (District). The property in question is situated within the northern portion of the Danielle Subdivision, located northwest of Danielle Court in Oak Forest, Cook County, Illinois. The appellant owns the property.

A delineation report submitted by Mr. Jury identified approximately 1.2 acres of emergent wetland with forest/shrub fringe. The wetland was delineated using the methodology of the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual (1987 Manual). Mr. Jury also submitted his opinion that the wetlands appeared isolated from navigable waters.

On March 17, 2004, the District determined the subject property contained waters of the U.S., including approximately 1.2 acres of federal wetlands.

The appellant disagreed that the identified wetlands are waters of the U.S. and submitted a Request for Appeal (RFA) on May 13, 2004.

**Summary of Decision:** I find that the District's administrative record supports its conclusion that wetlands regulated under the Clean Water Act (CWA) are present on the appellant's property. This appeal does not have merit.

**Appeal Decision Evaluation, Findings and Instructions to the Chicago District Engineer (DE):**

**Appellant's Stated Reason for Appeal:** A residential subdivision constructed in 1993 isolated Wetland A from any wetland or streams that may be connected to a navigable waterway.

**Finding: This reason for appeal has no merit.**

**Action: No action required.**

**Discussion:** The appellant concurs that the identified wetland areas meet the criteria of the 1987 Manual. The appellant also agrees with the wetland boundaries represented by the final delineation and verified by the District in its JD. During the appeal meeting, the appellant summarized his reason for appeal by stating that there are too many man-made structures and development between the wetland and Midlothian Reservoir to continue to call this a "connected" wetland. He stated that the most important disconnect is found as the water exits the wetland into a subdivision drainage swale and encounters obstacles such as topography and structures.

During the appeal meeting, the appellant and the District agreed that this area historically drained by natural tributaries into Midlothian Creek. They also agreed that natural drainage was replaced by man-made features: the wetland drains via a swale into a culvert; the culvert then travels under Danielle Court and discharges into a retention basin; a storm sewer collects the water in the retention basin; the storm sewer runs along 171<sup>st</sup> Street and discharges into a road side (I-57) drainage ditch; the drainage ditch then flows into the Midlothian Reservoir.

During the appeal meeting, the appellant initially questioned if the storm sewer that collects the water from the retention basin and runs along 171<sup>st</sup> Street discharges into the I-57 roadside ditch. After the site inspection he recognized that, due to similarities in size and orientation between the storm sewer and the outlet at the I-57 ditch, it is reasonable to expect the storm sewer to discharge into the I-57 road-side ditch.

However, the appellant still maintained that this connection does not represent a valid connection for several reasons: water must pass through man-made structures (e.g. culvert, storm sewer pipes, de/retention basins, swales); water must pass through the man-made structures in order to overcome the natural and man-made topography; and the distance that separates the wetlands from a navigable water is overlain with development.

The District's administrative record contained a copy of a 1999 aerial photograph with handwritten notes describing how the photograph shows evidence of the hydrologic connection established by the District between the site location and the Midlothian Reservoir. The 1999 aerial photograph and accompanying notation describe the hydrologic connection in the following manner: "Drains south through drainage swale/storm sewer into large wetland/detention area. Wetland/Detention area drains to the NE into a storm sewer that has an outlet near I-57 into a ditch that drains to the North into Midlothian Reservoir. Midlothian reservoir drains into Midlothian Creek which flows into the Little Calumet River."

According to the District's JD Decision Document, the District based its jurisdiction on the presence of adjacent wetlands. Corps regulations at 33 CFR 328.3(a)(7) state a wetland may be considered a water of the U.S. if it is *adjacent* to a water of the U.S. (other than a water that is itself a wetland). Regulations at 33 CFR 328.3(c) define adjacent as bordering, contiguous, or


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neighboring and state that wetlands separated from other waters of the United States by man-made barriers are adjacent wetlands.

While regulations are clear that man-made barriers do not preclude adjacency, the District must support how it established adjacency when barriers are present. The District accomplished this by adequately documenting the hydrologic connection between the wetlands and the Little Calumet River in its administrative record. Therefore, the appellant's argument that the documented connection can not be used to assert jurisdiction due to the presence of man-made barriers does not have merit.

**Overall Conclusion:** I find that the District's administrative record supports its decision that wetlands regulated under the CWA are present on the appellant's property. For the reasons stated above, the appeal does not have merit

FOR THE COMMANDER:

  
SUZANNE L. CHUBB  
Regulatory Program Manager  
Great Lakes and Ohio River Division